4-2400-12623-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIAVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF PUBLIC SAFETY

In the Matter of the Proposed Adoption of Rules Governing Fire Protection Systems, Minnesota Rules, 7512.2750 and 7512.2770

REPORT OF THE ADMINISTRATIVE LAW JUDGE

Administrative Law Judge Beverly Jones Heydinger conducted a hearing on these rules beginning at 9:30 a.m. on March 1, 2000, at the Coon Rapids City Council Chambers, Coon Rapids City Center, 11155 Robinson Drive, Coon Rapids, Minnesota. The hearing continued until everyone present had an opportunity to state their views on the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.[1] The legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency may have made after the proposed rules were initially published do not result in them being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing, when a sufficient number of persons request one. The hearing is intended to allow the agency and the administrative law judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

Jeffrey Bilcik, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, appeared as the attorney for the Department of Public Safety ("Department"). Several Department employees were on a panel available to provide the public with information about the proposed rules and to answer any questions. The panel members were: Tom Brace, State Fire Marshal; Kristine Hernandez Pierce, Rules Coordinator; Robert Dahm, Bureau Chief, State Fire Marshal Division; and David Stegura, Supervisor, Fire Protection Systems. Approximately nineteen members of the public attended the hearing. Twenty-five people signed the hearing register.

After the hearing ended, the record remained open for twenty days, until March 21, 2000, to allow interested persons and the Department an opportunity to submit written comments.[2] During this initial comment period the administrative law judge received one written comment.[3] Following the initial comment period, the record remained open for an additional five business days to allow interested persons and the Department the opportunity to file a written response to the comments submitted. The deadline for responses to the comments was March 28, 2000. One responsive

comments was received.[4] The hearing record closed for all purposes on March 28, 2000.

NOTICE

The Department must make this Report available for review for at least five working days before the Department takes any further action to adopt final rules or to modify or withdraw the proposed rules. During that time, this Report must be made available to interested persons upon request. If the Commissioner of Public Safety makes changes in the rules other than those recommended in this Report, he must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before he may adopt the rules in final form.

After adopting the final version of the rules, the Department must submit the rules to the Revisor of Statutes for a review of their form. After the Revisor of Statutes approves the form of the rules, the rules must be filed with the Secretary of State. On the day of that filing, the Department must give notice to everyone who requested notice of that filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On August 3, 1998, the Department published a Request for Comments on Planned Amendments to Rules Governing Fire Protection Systems at 23 State Register 305.[5] The Request for Comments indicated that an advisory council, although disbanded on August 1, 1998, had been involved with the project and would be asked to meet as a rulemaking advisory committee for the sole purpose of reviewing the proposed rules before a notice of intent to adopt was published. The Department mailed the Request for Comments to those individuals on the Department's rulemaking mailing list and to those individuals on the State Fire Marshal Division's rulemaking mailing list.[6] The Request for Comments was also posted on the internet under the Minnesota State Fire Marshal's homepage.[7]

2. On December 7, 1999, the Department requested approval to omit the text of the proposed rule amendments from publication in the State Register pursuant to Minnesota law.[8] The Chief Administrative Law Judge disapproved the Department's request on December 13, 1999.

3. On December 7, 1999, the Department requested that a hearing be scheduled and filed the following documents with the Chief Administrative Law Judge:

a. A copy of the proposed rules certified as to form by the Revisor of Statutes;

b. A draft of the Statement of Need and Reasonableness (SONAR);
c. The Dual Notice proposed to be published; and
d. An explanation of why the Department believed its Notice plan complies with Minnesota law[9] in support of the Department's request for prior approval of its Notice Plan for giving Dual Notice.[10]

4. Administrative Law Judge Bruce H. Johnson approved the Department's Notice Plan on December 10, 1999.[11]

5. On December 28, 1999, the Department mailed the Dual Notice of Hearing to all persons and associations who had registered their names with the agency for the purpose of receiving such notice.[12]

6. On December 30, 1999, the Department mailed the Dual Notice of Hearing to the following groups or individuals: Sprinkler Contractors, Design Contractors, Journeyman Sprinkler Fitters, Municipalities, Advisory Council Members, interested legislators, and other affected and/or interested parties. The Department also posted the Dual Notice on Minnesota State Fire Marshal internet homepage.[13]

7. The Dual Notice of Hearing was published on January 3, 2000, at 24 State Register 977.[14]

8. The Department received over twenty-five requests for a hearing to be held on this matter. Prior to the hearing, the original hearing location in Bloomington became unavailable. The Department subsequently secured a hearing location in Coon Rapids. On February 22 and 25, 2000, the Department mailed a notice to persons who requested a hearing, and to other interested and affected persons, informing them that a hearing would be held on the proposed rules.[15] The notice also informed the recipients about the change in the hearing location.[16]

9. On the day of the hearing, the Department placed the following additional documents into the record:

a. The proposed rules, including the revisor's approval, as originally published in the State Register on December 15, 1999, and the proposed rules with certain amendments withdrawn, to be published in the State Register on March 6, 2000;[17]
b. The Statement of Need and Reasonableness;[18]
c. Certificate of mailing the SONAR to the Legislative Reference Library;[19]
d. Certificate of mailing the dual notice, and certificate of the accuracy of the mailing list;[20]
e. Certificates of providing additional notice;[21]
f. Certificates of mailing the notice of hearing, location change, and withdrawal of certain proposed rule amendments to the following: all individuals on the Department's mailing list, interested legislators, advisory

council members, interested and/or affected parties, and that the this information was posted on the internet;[22] and

g. Written comments on the proposed rules received by the agency. Sixty-two written comments were received.[23]

10. The Department has met all of the procedural requirements under the applicable statutes and rules.

Background and Nature of the Proposed Rules

11. This rulemaking proceeding involves the addition of two new proposed rule parts: proposed Minnesota Rules, part 7512.2750, Civil Penalty, and part 7512.2770, Cease and Desist Order. When the Department published its Dual Notice on January 3, 2000, this rulemaking proceeding contemplated amendments to several other rule parts within chapter 7512. The Department, however, withdrew most of the proposed rule amendments except for the additions of proposed rule parts 7512.2750 and 7512.2770.

12. Minnesota Rules, Chapter 7512 helps the Department and the State Fire Marshal Division administer and enforce Minnesota Statutes, Chapter 299M. Chapter 7512 was originally developed by the State Fire Marshal Division with the assistance of the Minnesota Fire Protection Advisory Council. This council was created in 1992 and consisted of ten members appointed by the governor. Between 1993 and 1997, the council met several times to review and discuss the adequacy of chapter 7512.[24]

13. In 1998, the legislature made statutory changes to Minnesota Statutes, Chapter 299M.[25] Part of the statutory changes included the following:

a. appoint an eight-member Fire Protection Advisory Council by the Commissioner of the Department that would replace the original council;
b. authority to adopt permanent rules concerning the use of cease and desist orders when there is immediate risk to the public health or safety; and
c. authority to adopt permanent rules concerning the use of civil penalties for violations of the sprinkler licensing rules.

In accordance with the new law, the Commissioner of the Department appointed nine new members to the Fire Protection Advisory Council in October 1998. To promote continuity, the original council was invited to join the current council to review the proposed rules changes in April 1999.[26]

14. Proposed rule part 7512.2750 covers the procedures for implementation, administration, and enforcement of civil penalties. This proposed rule allows the commissioner to impose a civil penalty on a fire protection contractor, managing employee, or journeyman when he has good cause to believe a regulated party has violated Minnesota Statutes, chapter 299M, or a rule adopted under this statute.

Proposed rule part 7512.2770 covers cease and desist orders for activities in violation of Minnesota Statutes, chapter 299M. This proposed rule part includes when cease and desist orders may be issued, how long they are effective, and notice and other procedural requirements for implementation of the orders.

Statutory Authority

15. Minnesota Statutes, section 299M.04, sets out requirements for the Department for this rule proceeding. It states, in relevant part, that:

> The commissioner may issue a cease and desist order to cease an activity considered an immediate risk to public health or public safety. The commissioner shall adopt permanent rules governing when an order may be issued; how long the order is effective; notice requirements; and other procedures and requirements necessary to implement, administer, and enforce the provisions of this chapter.
>
> The commissioner, in place of or in addition to licensing sanctions allowed under this chapter, may impose a civil penalty not greater than $1,000 for each violation of this chapter or rule adopted under this chapter, for each day of violation. The commissioner shall adopt permanent rules governing and establishing procedures for implementation, administration, and enforcement of this paragraph.

16. The Administrative Law Judge finds that the Department has the statutory authority to adopt the proposed rules.

Rulemaking Legal Standards

17. Under Minnesota law,[27] one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.[28] The Department prepared a SONAR in support of its proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by Department staff and panel members at the public hearing, and by the Department's written post-hearing comment.

18. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[29] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[30] A rule is

generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[31] The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[32] An agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.[33]

19. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether an agency has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.[34] In this matter, the Department proposed changes to the rule after publication of the rule language in the State Register. Consequently, the Administrative Law Judge must determine if the modifications – the withdrawal of several proposed amendments – creates a substantially different rule from the one originally proposed.[35]

20. The standards to determine whether changes create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." In determining whether modifications are substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests," whether the "subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."

21. Minnesota law allows an agency to withdraw a proposed rule, or a portion of a rule, at any time prior to filing it with the Secretary of State,[36] "unless the withdrawal of a rule or a portion of the rule makes the remaining rules substantially different."[37]

22. The Administrative Law Judge finds that the Department's modifications to the proposed rule did not create a substantially different rule. Specifically, the withdrawal of several portions of the proposed rule did not make the remaining proposed rules substantially different because they were substantially severable and not

interrelated. The modifications made by withdrawing portions of the rule are a logical outgrowth of the comments submitted in response to the agency's notice.

Impact of Farming Operations

23. Minnesota Statutes, section 14.111 imposes an additional notice requirement when rules are adopted that affect farming operations. In essence, the statute requires that an agency must provide a copy of any such proposed rule change to the Commissioner of Agriculture at least thirty days prior to publishing the proposed rule in the State Register.

24. The proposed rules do not impose restrictions or have a direct impact on fundamental aspects of farming operations. The Administrative Law Judge finds that the proposed rule change will not affect farming operations in Minnesota, and thus finds that no additional notice is required.

Statutory Requirements for the SONAR

Cost and Alternative Assessments in the SONAR:

25. Minnesota Statutes, Section 14.131 requires an agency adopting rules to include in its SONAR:

> (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
> (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
> (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
> (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
> (5) the probable costs of complying with the proposed rule; and
> (6) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for an reasonableness of each difference.

26. The SONAR includes a discussion of the analysis that was performed by the agency to meet the requirements of this statute.[38] Those who will bear the costs of the proposed rules are fire sprinkler contractors, managing employees, journeyman sprinkler fitters, and municipalities. The agency identifies several different groups as benefiting from the rules. They include taxpayers and residents of a community due to

reduction in fire loss and related impact, and fire services because they would be able to control their fire safety concerns through fire prevention. Also, the insurance industry may benefit through reduced fire losses, and the fire sprinkler protection industry will benefit because the rules allow rule infractions to be dealt with through civil penalties rather than suspension of a whole company. The State Fire Marshal Division of the Department of Public Safety will also benefit because it can better protect public health and safety by use of the cease and desist authority. Finally, the agency includes certain homeowners as benefiting from the rules due to an enhanced level of fire safety in homes.[39]

27. The State Fire Marshal Division is the primary state agency that will enforce these rules. The Department anticipates no additional costs to the State Fire Marshal Division with the adoption of the proposed rules. The Department also anticipates that the proposed rules will have minimal implementation costs on other affected agencies because the rules are intended to lessen the impact on regulated parties.[40] Because the proposed rules include the possibility that civil penalty fines may be collected, any effect on state revenue is anticipated to be positive.[41]

28. In the SONAR, the agency listed some alternative methods for achieving the purpose of the proposed rules that were seriously considered and why they were rejected. The alternative methods considered and rejected, however, were with regard to proposed rule parts that were subsequently withdrawn and are not under consideration for purposes of this Report.[42]

29. With regard to the fifth regulatory factor, the Department does not expect any additional costs to the agency to comply with the proposed rules.[43] It does not consider civil penalties to be a cost because they are only applied when rule violations occur. If these penalties could be considered a cost of compliance, however, the Department believes that the new civil penalty provisions will be less costly than the existing rule provisions. This is because the civil penalties will target a particular violation and violator instead of imposing a licensing sanction that could affect an entire company.[44]

30. No federal regulations exist that specifically address fire safety and fire prevention efforts within buildings that are privately owned. There are some federal regulations regarding the construction of manufactured homes and buildings, but they preempt state laws and codes.[45]

Performance-Based Regulation:

31. Minnesota Statutes, Section 14.131, requires that an agency include in its SONAR a description of how it "considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002." Section 14.002 states, in relevant part, that "whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the

agency in meeting those goals." In this case, the Department performed the above analysis on a rule-by-rule basis.

32. The Department contends that the proposed civil penalty provisions are superior to the existing system. Under the current rules, the State Fire Marshal issues warning letters, suspends a license for a certain number of days, or revokes a license for a period of up to a year. The State Fire Marshal has found that issuing warning letters is not effective, and imposing one of the two licensing sanctions is often too severe.[46] The proposed civil penalty provisions comply with Minn. Stat. § 14.002 because they allow the agency to take punitive action against violators without necessarily penalizing an entire company.[47]

33. The Department contends that the proposed provisions allowing for cease and desist orders also comply with Minn. Stat. § 14.002 because "they provide an immediate response to dangerous situations while attempting to minimize the burdens placed on the regulated party by implementation of such actions."[48] These orders will be sought only for situations that present an immediate risk to public health or safety. All orders must be in writing and must include, for example, a specific citation to the law or rule violated, and a statement of evidence. These factors exemplify how the proposed rule minimizes the burdens placed on regulated parties. The Department states, however, that with regard to some parts of the proposed cease and desist provisions, it is difficult to minimize the burden on regulated parties. For example, the proposed rule states that if a party does not appear at the post-notice hearing, the party is held in default and the order will be made permanent.[49] The Department argues that "[t]he balance between greater flexibility among the regulated parties and the responsibility of the Department to enforce rules that will keep the public safe against immediate harm, weighs heavily toward the side of strict regulation."[50]

34. The Administrative Law Judge concludes that the Department has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

35. This Report is limited to the discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined, and it will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion including those made prior to the hearing, has been carefully read and considered. Moreover, because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the Department has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this Report by an affirmative presentation of facts. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

Analysis of Proposed Rule Part 7512.2750 – Civil Penalty

36. The proposed civil penalty provisions are all new. Proposed subpart 1 of this rule states that the Commissioner "shall impose a civil penalty upon [a] fire protection contractor, managing employee, or journeyman" if the Commissioner has "good cause to believe [s/he] is engaging or has engaged in conduct that violates [applicable law]."[51] A civil penalty may be imposed "in place of or in addition to licensing sanctions allowed under [applicable law]." Subpart 1 defines "good cause to believe" as grounds that are "put forth in good faith that are not arbitrary, irrational, unreasonable, or irrelevant . . . ." The rule requires that the basis for good cause be established by one or more of the following: written information from an identified person, facts provided by a regulated party, the Commissioner's personal knowledge, or information obtained by the Department through an inspection. The Department may not impose a civil penalty of more than $1,000 for each violation, for each day of violation.[52] Finally, the proposed rule also includes a list of assessment factors that must be considered when determining the amount of the penalty,[53] procedures regarding the notice of civil penalty,[54] payment procedures,[55] and notice that penalties are subject to certain provisions of Minnesota Statues, chapter 14.[56]

37. The Department states that the civil penalty provisions are needed because the current system – issuing warning letters and imposing licensing sanctions such as suspensions – is ineffective. It notes that license suspension under the current system often times prevents an entire company from performing fire protection related work, even though not all regulated workers engaged in or were responsible for the violation. Generally, the civil penalty provisions are reasonable because they allow the Commissioner to penalize a specific person and violation.[57]

38. One issue that was raised during the 30-day comment period and at the public hearing was the use of the word "shall" in proposed rule part 7512.2750, subparts 1 and 4. Opponents, such as Mr. Steven Hinson, argue that "shall" should be replaced with "may," thereby giving the Department the option of imposing a civil penalty.[58] Mr. Hinson's concern with the word "shall" is that it forces the Department to issue a penalty for every infraction even if it is minor or unintentional.[59]

39. The Department anticipated this concern and addressed the issue of "shall" versus "may" in its SONAR. It states that the decision to use "shall" was made because of the belief that using "may" would grant the Commissioner too much discretion. If rule language grants too much discretion, then the rule is subject to disapproval.[60] The Department considered using "may" and including in the rules a list of what constitutes a violation that is subject to a civil penalty. It rejected this option because it "would be too limiting to the Division."[61]

40. In its letter to the Administrative Law Judge, dated March 21, 2000, the Department again addresses the issue of "shall" versus "may." The Department notes that when an agency drafts rule language, the word "shall" is encouraged over the use

of "may" in order to avoid unequal and inconsistent application of the rules against regulated parties.[62] It submits that the use of "may" instead of "shall" in this case would allow the Department to completely disregard or ignore violations even if the assessment factors were satisfied.[63]

41. The Department notes Mr. Hinson's concern about a lack of flexibility in imposing civil penalties even for unintentional or lesser infractions. In response, the Department contends that Mr. Hinson's concerns are unwarranted because the proposed rule, even with the word "shall," still grants discretion to the Commissioner.[64] In support of this, the Department cites to proposed subpart 3, which lists several assessment factors that must be considered when determining the amount of a civil penalty. The Department contends that: "[b]ecause the assessment factors do exist and civil penalties are assessed by taking into consideration all the factors listed, it is very possible that the Department will issue a notice of civil penalty pursuant to Minn. R. part 7512.2750, subp. 4, where the amount of penalty may be compromised to where no penalty is owed."[65] In other words, under the proposed rules the Department has the ability of imposing a civil penalty of $00.00. Finally, the Department contends that the Administrative Law Judge's scope of review of the rule language is limited to the rule on its face, not as applied.[66]

42. The proposed rules in this case have not yet been adopted, nor do they have the force and effect of law. Consequently, the review of these rules is similar to the court's review of a pre-enforcement challenge to proposed agency rules.[67] The standard of review is limited in a pre-enforcement challenge.[68] It is not appropriate for the Administrative Law Judge to broadly scrutinize a rule based upon hypothetical facts.[69] Put another way by the courts, "the reasonableness of the rule *as applied* cannot be considered in this action."[70]

43. Proposed rule part 7512.2750 is reasonable as written. In particular, the Department has adequately demonstrated that the use of "shall" as opposed to "may" is reasonable considering the purpose and nature of rules. The use of "shall" assures or at least encourages a more consistent and equal-handed application of the rule against all regulated parties.

44. Additionally, the Department has demonstrated the legality of the rule part. On its face, this rule part does not exceed the Department's statutory authority by using the word "shall." The proposed rule as written allows the Department flexibility in assessing the amount of a civil penalty, which could result in $00.00 being owed by the regulated party. Also, civil penalties must be evidenced by "good cause to believe" that a violation has occurred. "Good cause to believe" must be based on good faith grounds "that are not arbitrary, irrational, unreasonable, or irrelevant." This language, by its nature, bestows upon the Commissioner a certain amount of flexibility and discretion as to whether a civil penalty is imposed.

45. Another issue raised during the comment period and at the public hearing regarded the assessment factors in subpart 3, item B. Mr. Alan Moy of Sentry

Fire Protection, representing the National Fire Sprinkler Association, argues that a person's ability to pay[71] and the effect of a penalty on a person's ability to continue in business[72] should not be considerations when determining the amount of a civil penalty.[73] Mr. Moy contends that these two items should not be considered in assessing a penalty because they are not considered with respect to licensing fees and bonding ability. In response, the Department argues that both factors are necessary and reasonable because it "is in the business of public safety and not in the business of putting persons out of business."[74] A civil penalty could prove to be very costly and result in a severe hardship to a regulated party. The Department believes consideration of the two factors helps allow for a more reasonable and fair outcome on a case-by-case basis. It also maintains that licensing fees and bonding ability are ordinary business expenses. Civil penalties, on the other hand, are not and, unlike normal and known business expenses, can be very detrimental to a business.[75]

46. The Administrative Law Judge finds that the Department has adequately demonstrated that consideration of a person's ability to pay and the effect of a civil penalty on a person's ability to stay in business are factors that are both needed and reasonable when determining the amount of penalty to be assessed.

47. Notwithstanding the above findings, the Administrative Law Judge recommends that the Department make a technical correction to proposed Subpart 4 (Notice of civil penalty), item B. Item B states as follows:

> The subject of the penalty shall respond to the notice within 15 days. The subject has the following options for response:
> (1) pay the penalty and close the case;
> (2) submit an offer in compromise of the proposed civil penalty;
> (3) submit a written explanation, information, or other material in answer to the allegations or in mitigation of the proposed civil penalty; **or**
> (4) request the commissioner to initiate a hearing under Minnesota Statutes, sections 14.50 to 14.69.[76]

The language in subpart 4, item B suggests that a person subject to a penalty can pick only one of the four options for response. The Department, however, has indicated that this is not the agency's intention. The Department also indicated that if a person initially responds in one way, he is not necessarily precluded from responding to the notice in another way at a later date. For example, if a party subject to a penalty initially offers a compromise but no compromise is reached, the Department contemplated that the party may then request that the commissioner initiate a hearing. The Administrative Law Judge recommends that the agency clarify proposed subpart 4, item B to better reflect its intention.

48. The ALJ recommends language similar to the following: "The subject of the penalty shall respond to the notice within 15 days. The subject ~~has~~ may select one

or more of the following options for response . . . ." This change, or one having a similar effect, is needed and reasonable, and would not create a substantially different rule.

49. The clarification recommended by the ALJ is not a defect in the rules, but is merely a recommendation for clarification to the proposed rules that the Department may adopt if it chooses to do so.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Public Safety gave proper notice in this matter.

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. The Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).

4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4; and 14.50 (iii).

5. The Department's action of withdrawing several proposed rule parts that were published in the State Register does not create a substantially different rule, nor does it make the remaining proposed rules substantially different within the meaning of Minn. Stat. §§ 14.05, subd. 2; and 14.15, subd. 3.

6. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

7. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts as appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted.

Dated this 21st day of April 2000.

S/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

[1] Minn. Stat. §§ 14.131 through 14.20 (1998). (Unless otherwise stated, all further references to Minnesota Statutes are to the 1998 version.)
[2] Minn. Stat. § 14.15, subd. 1.
[3] The one comment received was from the Department of Public Safety, dated March 21, 2000.
[4] The one responsive comments received was from the Department, dated March 27, 2000, stating that because no comments were received during the twenty-day comment period (other than its own), it had no further comments regarding the proposed rules.
[5] Ex. A.
[6] Id.
[7] Id.
[8] Minn. Stat. § 14.14, subd. 1a (b).
[9] Minn. Stat. §§ 14.14, subd. 1a, and 14.22.
[10] Minn. R. part 1400.2060.
[11] Ex. G.
[12] Id.
[13] Id.
[14] Ex. F.
[15] Ex. H. The Notice of Hearing, Notice of Location Change, and Notice of Withdrawal, was sent to the following groups: all individuals on the Department's mailing list, interested legislators, advisory council members, former advisory council members, interested parties, and affected parties. The Department also posted this notice on its web page.
[16] Id.
[17] Ex. C.
[18] Ex. D.
[19] Ex. E.
[20] Ex. G.
[21] Id.
[22] Ex. H.
[23] Ex. I.
[24] Ex. D at 1.
[25] 1998 Minnesota Laws, Chapter 367, Article 11.
[26] Ex. D at 2.
[27] Minn. Stat. § 14.14, subd. 2; Minn. R. part 1400.2100.
[28] Mammenga v. Department of Human Services, 442 N.W.2d 786 (Minn. 1989); Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984).
[29] In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).
[30] Greenhill v. Bailey, 519 F.2d 5, 19 (8th Cir. 1975).
[31] Mammenga, 442 N.W.2d at 789-90; Broen Mem'l Home v. Minnesota Dep't of Human Services, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).
[32] Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d at 244.
[33] Federal Sec. Adm'r v. Quaker Oats Co., 318 U.S. 218, 233 (1943).
[34] Minn. R. part 1400.2100.
[35] Minn. Stat. § 14.15, subd. 3.
[36] Minn. Stat. § 14.05, subd. 3.
[37] Minn. R. part 1400.2240, subp. 8.
[38] Ex. D at 7-9. The ALJ notes that the SONAR was not amended after the agency withdrew several portions of the proposed rule. Consequently, the statutory analysis factors may include information not specifically relevant to the two remaining proposed rule parts (7512.2750 Civil Penalty, and 7512.2770 Cease and Desist Order).
[39] Id. at 7-8.
[40] Id. at 8.
[41] Id.
[42] See id. at 8-9.

[43] Ex. D at 9.
[44] Id.
[45] Id.
[46] Ex. D at 19.
[47] Id. at 19 – 22.
[48] Id. at 23.
[49] Proposed rule part 7512.2770, subp. 5, item C.
[50] Ex. D at 25.
[51] The Commissioner must believe that the regulated party is or has violated Minnesota Statutes, chapter 299M, "or a rule adopted under Minnesota Statutes, section 299M.04."
[52] Subpart 2 of proposed rule part 7512.2750.
[53] Proposed subpart 3. The assessment factors include factors listed in Minn. Stat. § 14.045, subd. 3 (a), degree of culpability, ability to pay, good faith attempt by regulated party to remedy cause of violation, and the effect of a penalty on a person's ability to do business.
[54] Proposed subpart 4.
[55] Proposed subpart 5.
[56] Proposed subpart 7.
[57] Ex. D at 19.
[58] Ex. I. Letters from Steven L. Hinson to Dave Stegura of 1/3/00 and 1/20/00. Mr. Hinson also testified at the public hearing. His testimony addressed the same wording issue as noted in his letters to Mr. Stegura.
[59] Id.
[60] Ex. D at 20. See Blocher Outdoor Adver. Co., Inc., v. Minnesota Dept. of Transp., 347 N.W.2d 88 (Minn. Ct. App. 1984) (noting that rule language is intended to be more specific than statutory language in order to apply statutes in a reasonable and consistent manner against all regulated parties).
[61] Ex. D at 20.
[62] Letter from Commissioner Weaver to Judge Heydinger of 3/21/00, at 4. The Department states that in initial drafts of these rules the word "may" was used, but was "flagged by the Revisor's office as potential discretion problems." Id.
[63] Id. at 5.
[64] Id. at 5-6.
[65] Id.
[66] Id. at 4 (citing Beck et al., Minnesota Administrative Procedure 353 (2d ed. 1998))
[67] See Minn. Stat. § 14.45 (judicial review of pre-enforcement rule challenges).
[68] Id. at 67-68.
[69] Id. (quoting Minnesota-Dakotas Retail Hardware Ass'n v. State, 279 N.W.2d 360, 363 (Minn. 1979)).
[70] Id. at 68 (emphasis in the original).
[71] Proposed rule part 7512.2750, subp. 3, item B (2).
[72] Proposed rule part 7512.2750, subp. 3, item B (4).
[73] Ex. I . Letter from Alan F. Moy to David Stegura of 1/18/00. Mr. Moy also testified at the public hearing.
[74] Letter from Commissioner Weaver to Judge Heydinger of 3/21/00, at 7.
[75] Id.
[76] Proposed rule part 7512.2750, subp. 4, item B (emphasis supplied).